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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 172.

MARINE TRANSIT CORPORATION and Tug "GERALD A. FAGAN" by MARINE TRANSIT CORPORATION, Claimant,

Petitioner,

against

LOUIS LOUIS DREYFUS and CHARLES LOUIS DREYFUS, Co-partners, doing business under the firm name and style of LOUIS DREYFUS & COMPANY,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION.

OTTO & LYON,
Proctors for Respondents,
by GEORGE V. A. MCCLOSKEY,
Counsel.

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Respondents.

No. 172.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

The Circuit Court of Appeals for the Second Circuit affirmed a final decretal order in admiralty entered upon an award of arbitrators in favor of the respondents (libellants) in a proceeding under Section 8 of the United States Arbitration Act. The respondents, cargo owners, filed their libel for loss of cargo in the Southern District of New York *in rem* against the tug Gerald A. Fagan and the barge John E. Enright—against which latter proceedings were abandoned—and *in personam* against the Marine Transit Corporation, which not only

appeared *in personam* but as claimant, giving a stipulation for value (R. 25 A, B) to release the tug. We do not understand the statement appearing in petitioner's brief (p. 23): "It would be inferred by anyone reading the opinion of the Circuit Court of Appeals that some action *in rem* was involved in its decision. Such was not the case." Such was the case upon the face of the record.

Section 8 of the Act is consistently ignored in the petitioner's brief but all the proceedings herein were taken under authority thereof. The Section reads as follows:

> "That if the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the Court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award."

The controversy, as stated in the opinion of the Circuit Court of Appeals (R. 239, 240) arose under a contract whereby the petitioner agreed to furnish the respondents as charterers insurable canal tonnage for about 200,000 bushels of wheat on the Buffalo to New York part of an international carriage from Fort William, Ontario, for export. The booking contract (R. 147, 148) incorporated by reference the terms of the New York Produce Exchange Canal Grain Charter Party No. 1 as amended (R. 149-156), including an arbitration clause requiring disputes thereunder to be arbitrated before the Committee on Grain of the New York Produce

Exchange (R. 156). The grain was "in bond for export" (R. bottom p. 164) as appears from the Marine Transit Corporation's bill of lading covering 19,200 bushels which were laden upon the barge Edward A. Ryan and for the loss of which the libel was filed, as on entering the Government lock at Troy, while in tow of the petitioner's tug Gerald A. Fagan, the barge Edward A. Ryan came in contact with the guard wall and sank. All the maneuvering had to be done by the tug: the barge John E. Enright, which was also in tow, was not steering (R. 91) so that she was obviously not liable.

The District Court ordered the Marine Transit Corporation to submit to arbitration any and all issues under the contract (R. 28, 29). The merits were accordingly presented to the Committee on Grain who took extended testimony (R. 30-128), heard petitioner's counsel (R. 129-137) as well as respondents' (R. 138-146) and made an award that the Marine Transit Corporation pay Louis Dreyfus & Company $23,016., plus interest amounting to $1,168.66, and in addition bear the costs and expenses of the arbitration in the sum of $362.50 (R. 166). Such award was confirmed by the District Court (R. 214, 215). Confirmation was opposed on grounds not urged upon appeal to the Circuit Court of Appeals or in this Court and the grounds now urged were not then presented.

Thereafter the petitioner procured an order requiring the respondents to show cause why they should not be restrained from recovering (as provided in the decretal order confirming the award) from "the claimant or its stipulators on behalf of the tug Gerald A. Fagan" but such order was vacated by Judge Caffey (R. 225, 226) with an opinion (R. 223, 224).

When the arbitration was ordered, all further proceedings against the barge John E. Enright were abandoned and, although a formal discontinuance as against the John E. Enright was omitted in the decretal order

confirming the award, such formal discontinuance was thereafter entered (R. 235, 236).

The Marine Transit Corporation, "claimant and respondent" (R. 227), appealed to the Circuit Court of Appeals for the Second Circuit and filed assignments of error (R. 229-232) and additional assignments of error (R. 233, 234) which did not assign as error Point III and Point V of its brief in support of the petition.

POINT I.

The Arbitration Act is constitutional.

The constitutionality of the Act is assailed in petitioner's Points I and II. No case questioning the constitutionality of the Act is known to us or cited by opposing counsel. Their whole argument is pervaded by the notion that the judicial power of the nation is communicated to the existing Federal courts by the Constitution of the United States. On the contrary, only the original jurisdiction of the Supreme Court is prescribed by the Constitution and even that court is of statutory organization. The inferior Federal courts have only a statutory jurisdiction and Congress may distribute to them as much or as little of the judicial power of the United States as Congress may see fit. The United States District Courts have no right to any jurisdiction which Congress has withheld and such jurisdiction as it grants must be exercised in accordance with the procedural requirements of Congressional enactment.

As this Court said in *Jackson* vs. *Steamboat Magnolia*, 20 How. (61 U. S.) 296 at p. 300:

> "The Constitution, in defining the powers of the courts of the United States, extends them to 'all

cases of admiralty and maritime jurisdiction'. It defines how much of the judicial power shall be exercised by the Supreme Court only; and it was left to Congress to ordain and establish other courts, and to fix the boundary and extent of their respective jurisdictions. Congress might give any of these courts the whole or so much of the admiralty jurisdiction as it saw fit. It might extend their jurisdiction over all navigable waters, and all ships and vessels thereon, or over some navigable waters, and vessels of a certain description only."

In *Kline* vs. *Burke Construction Co.*, 260 U. S. 226, 233, 234, this Court, referring to the provisions of the Constitution respecting the judicial power, said:

"The effect of these provisions is not to vest jurisdiction in the inferior courts over the designated cases and controversies but to delimit those in respect of which Congress may confer jurisdiction upon such courts as it creates. Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution."

In *The Gansfjord*, 25 F. (2d) 736, 737—affirmed 32 F. (2d) 236, 5th C. C. A.—Burns, D. J., said:

"Certainly Congress may distribute the judicial power as its wisdom, in the light of experience, dictates, under its broad powers to regulate commerce, etc., and to ordain and establish courts inferior to the Supreme Court. If this be so, there

can be no question of its right to prescribe mere procedural forms for the enforcement of remedial legislation in the public interest."

The Arbitration Act is a procedural statute and as such entirely within the competency of Congress which has power (Constitution of the United States of America, Article I, Section 8, clause 9) "to constitute tribunals inferior to the Supreme Court" *i. e.*, "such inferior courts as the Congress may from time to time ordain and establish" (Article III, Section 1) and which has power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof" (Article I, Section 8, clause 18), thereby referring to the power to establish such courts as well as to the power over interstate and foreign commerce (Article I, Section 8, clause 3) and the admiralty and maritime jurisdiction comprised in the judicial power of the nation (Article III, Section 2, clause 1). That the Arbitration Act is in effectuation of the powers so committed to Congress and conducive to the purposes for which its powers were so committed, is too plain for any argument to make it plainer and the policy expressed in the Act has received so universal an approval that it would be strange to find an opposite policy embodied and embedded in the Constitution which was adopted with a view to the distribution of constitutional power between the states and the nation and without any forecast of the argument now presented by the appellant.

In *Atlantic Fruit Co.* vs. *Red Cross Line*, 5 F. (2d) 218, 2nd C. C. A., considering the question whether the New York statute on the subject affected recourse to admiralty and suggesting that the situation there de-

picted was "one that calls for remedial action", the Court said, at bottom p. 219:

> "* * * It is entirely plain that this matter of arbitration, whether based on a New York statute or resting upon traditional and judge-made law, is wholly matter of remedy."

So in *Matter of Berkovitz* vs. *Arbib & Houlberg,* 230 N. Y. 261, the New York Court of Appeals by Cardozo, J., upholding the New York statute but applying it prospectively only, said (pp. 270, 271):

> "The common-law limitation upon the enforcement of promises to arbitrate is part of the law of remedies * * * Arbitration is a form of procedure whereby differences may be settled * * * * * * A promise that differences will be arbitrated is not illegal and a nullity without reference to the law in force when differences arise. Since it is directed solely to the remedy, its validity is to be measured by the public policy prevailing when a remedy is sought. In that respect, it is not different from a promise that future controversies shall be submitted to a court. The jurisdiction of the court at the time of the submission will determine whether the promise is to be rejected or enforced. This is so whether jurisdiction in the interval has been diminished or enlarged."

In the *Berkovitz* case, *supra,* the Court of Appeals considered the validity of the New York statute in its constitutional aspects and its argument is largely applicable here. The Court of Appeals held that the statute was not inconsistent with the constitutional right of trial by jury for that right is one that can be waived and was waived by the consent to arbitrate. The Court

of Appeals rejected the argument that the statute abridged the general jurisdiction of the Supreme Court as continued "unimpaired" by the state constitution. The court held that in establishing a Supreme Court to administer the law, the People did not petrify the law which the court was to administer and that the Supreme Court did not lose a power inherent in its very being when it lost power to give aid in the repudiation of a contract, concluded without fraud or error, whereby differences are to be settled without resort to litigation. "For the right to nullify is substituted the duty to enforce." Jurisdiction, the Court of Appeals regarded, not as renounced but as adapted in the time and manner of its exercise to the convention of the parties. The Court of Appeals concluded (p. 276):

> "We think there is no departure from constitutional restrictions in this legislative declaration of the public policy of the state. The ancient rule, with its exceptions and refinements, was criticized by many judges as anomalous and unjust. * * * It was followed with frequent protest, in deference to early precedents. Its hold even upon the common law was hesitating and feeble. We are now asked to declare it so imbedded in the very foundations of our jurisprudence and the structure of our courts that nothing less than an amendment of the Constitution is competent to change it. We will not go so far. The judges might have changed the rule themselves if they had abandoned some early precedents, as at times they seemed inclined to do. They might have whittled it down to nothing, as was done indeed in England, by distinctions between promises that are collateral and those that are conditions * * *. No one would have suspected that in so doing they were undermining a juris-

diction which the Constitution had charged them with a duty to preserve. Not different is the effect of like changes when wrought by legislation."

Even before the Act of Congress, in holding the New York Arbitration Law applicable without constitutional impediment to a charter party embracing an arbitration clause, this Court in *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, thus stated its view of arbitration agreements in terms that anticipate the petitioner's arguments and render further consideration by this Court needless (pp. 120-123):

"The Federal courts—like those of the states and of England—have, both in equity and at law, denied, in large measure, the aid of their processes to those seeking to enforce executory agreements to arbitrate disputes. They have declined to compel specific performance (*Tobey* v. *Bristol County*, 3 Story, 800, 819-826, Fed. Cas. No. 14,065); or to stay proceedings on the original cause of action (Story, Eq. Jr. §670). They have not given effect to the executory agreement as a plea in bar, except in those cases where the agreement, leaving the general question of liability to judicial decision, confines the arbitration to determining the amount payable, or to furnishing essential evidence of specific facts, and makes it a condition precedent to the cause of action. *Hamilton* v. *Liverpool & L. & G. Ins. Co.*, 136 U. S. 242, 255, 34 L. ed. 419, 423, 10 Sup. Ct. Rep. 945; *Martinsburg & P. R. Co.* v. *March*, 114 U. S. 549, 29 L. ed. 255, 5 Sup. Ct. Rep. 1035. But an agreement for arbitration is valid, even if it provides for the determination of liability. If executory, a breach will support an action for damages. *Hamilton* v. *Home Ins. Co.*, 137 U. S. 370, 385, 386, 34 L. ed. 708, 713, 11 Sup. Ct.

Rep. 133. If executed—that is, if the award has been made—effect will be given to the award in any appropriate proceeding at law or in equity. *Karthaus* v. *Yllas Y. Ferrer*, 1 Pet. 222, 7 L. ed. 121; *Burchell* v. *Marsh*, 17 How. 344, 15 L. ed. 96; *Bayne* v. *Morris*, 1 Wall. 97, 17 L. ed. 495. And, although there is no Federal legislation on the subject, an executory agreement, however comprehensive, will, if made a rule of court, be enforced in courts of the United States by any appropriate process. *Hecker* v. *Fowler*, 2 Wall. 123, 17 L. ed. 759.

In admiralty, also, agreements to submit controversies to arbitration are valid. Reference of maritime controversies to arbitration has long been common practice. *Houseman* v. *The North Carolina*, 15 Pet. 40, 45, 10 L. ed. 653, 655. The insertion in a charter party of a provision for such settlement of disputes arising thereunder was practised, at least as early as the eighteenth century. *Thompson* v. *Charnock*, 8 T. R. 139, 101 Eng. Reprint, 1310. For breach of an executory agreement a libel for damages will lie. An executory agreement may be made a rule of court. *United States* v. *Farragut*, 22 Wall. 406, 419, 22 L. ed. 879, 883; *Kleine* v. *Catara*, 2 Gall. 61, Fed. Cas. No. 7,869. An award will be given full effect. The agreement, whether executory or executed, cannot be enforced in admiralty by specific performance; merely because that court lacks the power to grant equitable relief. *The Eclipse (Rea* v. *The Eclipse)*, 135 U. S. 599, 608, 34 L. ed. 269, 272, 10 Sup. Ct. Rep. 873. The executory agreement (perhaps in deference to the rule prevailing at law and in equity) will not be given effect as a bar to a libel on the original cause of action. The reluctance of the admiralty court to lend full aid goes, however, merely to the remedy. The substantive right created by an agree-

ment to submit disputes to arbitration is recognized as a perfect obligation." (Foot-notes omitted.)

The Act, so far from depriving the district courts of jurisdiction—for all their jurisdiction, as we have seen, is purely statutory, not by constitutional grant—has enlarged their jurisdiction to embrace the enforcement of arbitration agreements, not only by ordering such arbitration to proceed but by entering decree upon the award. The award of arbitrators has been given effect, without aid of statute, where the parties voluntarily proceeded with the arbitration. In requiring an unwilling party, by force of the statute, to proceed with the arbitration, the court gives essentially the same effect to the award when rendered. If an arbitrator, though chosen by the parties prior to controversy, is a constitutional stumbling-block, we wonder how special commissioners in admiralty have been so much in use since the organization of the Government under the Constitution. The petitioner's argument is as applicable to the one as to the other. Even the merits of a cause may by consent of parties, though not otherwise, be referred to a commissioner (*The Bronx*, 246 Fed. 809, 2nd C. C. A.; *Luckenbach* vs. *Delaware, Lackawanna & Western R. Co.*, 168 Fed. 560) and it is precisely such consent that supports a reference to arbitrators.

As it has been held that "the reluctance of the admiralty court to lend full aid goes, however, merely to the remedy" and that "the substantive right created by an agreement to submit disputes to arbitration is recognized as a perfect obligation" (*Red Cross Line* vs. *Atlantic Fruit Co.*, 264 U. S. 109, 123), it is not reasonable to find the Arbitration Act unconstitutional for supplying the remedy appropriate to the recognized substantive right. In *Marchant* vs. *Mead-Morrison Mfg. Co.*, 29 F. (2d) 40, (2nd C. C. A.), certiorari denied 278 U. S. 655, in directing the District Court to remand

compulsory arbitration proceedings under the New York statute to the state courts, the Court said:

> "The proceeding from the outset had all the elements of a judicial controversy, to wit, adversary parties and an issue, in which the claim of one of the parties against the other, capable of pecuniary estimation, was stated and answered in the same form of pleading. All this was addressed to the Supreme Court of the state, functioning as a judicial tribunal. *Gaines* v. *Fuentes*, 92 U. S. 10, 23 L. ed. 524. The appointment of the arbitrator was but a step in the relief sought by the plaintiff from the damages inflicted by the breach of the contract."

By parity of reasoning, under the United States Arbitration Act, the appointment of arbitrators is but a step in a proceeding presenting all the elements of a judicial controversy and this is more obviously true under Section 8 of the Act, pursuant to which the proceeding is commenced by libel and seizure "according to the usual course of admiralty proceedings."

As Judge Cardozo suggested in the *Berkovitz* case, *supra*, that in establishing a Supreme Court, the People of the State did not petrify the law, which the court was to administer, so, in conferring admiralty and maritime jurisdiction upon the United States Government the Constitution of the United States did not petrify the maritime law. As this Court said in *Southern Pacific Co.* vs. *Jensen*, 244 U. S. 205, 215:

> "Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country."

It is in the exercise of that power that Congress enacted the Limited Liability Act which gave to the courts the power, certainly of a maritime nature if not previously exercised in the American admiralty, to entertain proceedings for the limitation of the liability of ship owners. Such a proceeding is an independent head of jurisdiction without regard to whether the claims limited against are such as might have been sued upon in the admiralty or not.

The No. 6, 241 Fed. 69, 71 (2nd C. C. A.).

It was in the exercise of that paramount power that Congress enacted the Ship Mortgage Act, 1920 (Act of June 5, 1920, c. 250, 41 Stat. at L. 988), the validity of which was at least assumed in *The Northern Star*, 271 U. S. 552, as it had been assumed in advance in *Bogart* vs. *The Steamboat John Jay*, 17 How. (58 U. S.) 399, at p. 402, where this Court, after adverting to the English Act giving the admiralty courts an enlarged cognizance of mortgages of ships, said:

> "Until that shall be done in the United States, by Congress, the rule, in this particular, must continue in the admiralty courts of the United States, as it has been."

Now, we do not contend that Congress may enlarge the maritime jurisdiction to embrace subjects without maritime relation but certainly, where such relation exists, Congress may create a statutory jurisdiction not previously in use and in doing so may authorize appropriate remedies, though otherwise unknown to admiralty practice. So in a limitation of liability proceeding, under the Acts of Congress, the admiralty court "in working out its jurisdiction acquires the right to marshal all claims, whether of strictly admiralty origin or not" and further has power "to do what is

exceptional in a court of admiralty—to grant an injunction and by such injunction bring litigants, who do not have claims which are strictly admiralty claims, into the admiralty court" (*Hartford Accident & Indemnity Co.* vs. *Southern Pacific Co.*, 273 U. S. 207, 217, 218).

So, in cases arising under the eighth section of the United States Arbitration Act, the power to enforce specific performance of the contract to submit to arbitration is but matter of remedy incident to jurisdiction under the Act.

POINT II.

The Act should be construed with a view to effectuating its purposes.

The petitioner's challenge to the validity of the Act is scarcely more hostile to it than its other points which all tend to narrow the scope of the Act, to embarrass procedure under it and to render it as little efficacious as possible, in short, a mere trap of technicalities for those who may rely upon it. The Act should on the contrary be construed in furtherance of its purpose and, as remedial legislation, with a view to facilitating the use of arbitration. The Act was responsive to general public demand from the commercial interests of the country and it would be unbecoming for the courts to assume that Congress intended rather to disappoint and defeat the expectations of the commercial community than to give them effect.

We may say of the United States Arbitration Act what this Court has said of the Limited Liability Act in *Providence & New York S. S. Co.* vs. *Hill Mfg. Co.*, 109 U. S. 578, 588, 589, 590:

> "In these provisions of the statute we have sketched in outline a scheme of laws and regula-

tions for the benefit of the shipping interest, the value and importance of which to our maritime commerce can hardly be estimated. Nevertheless, the practical value of the law will largely depend on the manner in which it is administered. If the courts having the execution of it administer it in a spirit of fairness, with the view of giving to ship owners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations (as before stated) will be of the last importance; but if it is administered with a tight and grudging hand, construing every clause most unfavorably against the ship owner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment. * * *

We have said that, by the provisions of the act, the scheme was sketched in outline. A reference to its provisions shows that it was only in outline; and that the regulation of details as to the form and modes of proceeding was left to be prescribed by judicial authority. The law was evidently drawn in view of similar laws adopted and in operation in England and in some of the States. It laid down a few general principles and propositions, and left it to the courts to enforce them and carry them into practical effect."

The court should construe the United States Arbitration Act in a similar spirit instead of seeking to clip the wings of the statute.

POINT III.

Section 8 of the Act, referring to causes of action otherwise justiciable in admiralty, is independent of Section 9 referring to agreements for arbitration on which an award has been made and which authorize entry of judgment thereon.

The Act embraces a wide subject, including not only arbitration agreements which have been breached and result in litigation at law, in equity or in admiralty, but also arbitration agreements which have not been breached but upon which an award has been made so that it remains to provide procedure for enforcing the award. The Act is not one all parts of which are to be applied to a single subject-matter but rather one which in different sections deals with various aspects of a diversified subject-matter. Hence it is that Section 8, addressing itself to cases where "the basis of jurisdiction" is "a cause of action otherwise justiciable in admiralty", asserts the independency of its provisions by the express language "notwithstanding anything herein to the contrary". It is these words which the petitioner seeks in effect to delete by the argument that the application of Section 8 must be confined to cases within Section 9.

The provisions of Section 8 are by its terms effective "notwithstanding anything herein to the contrary". Consequently, these provisions are not cut down by the language of Section 9 which has a different comprehension and makes no reference whatever to the causes of action "otherwise justiciable in admiralty" mentioned in Section 8. Both Section 8 and Section 9 begin with "if" but the presupposition to the application of Section 8 is "if the basis of jurisdiction be a cause of action otherwise justiciable in admiralty"—in

which case the court may not only entertain the libel and issue process but after directing the arbitration to proceed may enter a decree upon the award—whereas the hypothesis that authorizes the application of Section 9 is "if the parties in their agreement have agreed that a judgment of the court shall be entered upon the award", etc. These sections deal with unrelated aspects of the subject of arbitration and the emphatic words of Section 8—"notwithstanding anything herein to the contrary"—repel any supposition of their interdependence. The argument that Section 8 is conditioned by Section 9 disregards the language of Section 8 and assumes that the object of the Act is to impede and defeat its own application.

Section 9 contemplates cases where the first application to the court is to confirm the award, the arbitration not having been refused but carried out, whereas Section 8 looks to libel and seizure, application to direct that the arbitration proceed and entry of decree upon the award as incident to the litigation.

Under Section 4, the party demanding arbitration may petition any court of the United States which, save for the arbitration agreement, would have jurisdiction at law, in equity or in admiralty of a suit arising out of the controversy. In respect of admiralty causes involving seizure, Section 8 makes special provision. In controversies at law or in equity, however, residence is an important factor while it is quite immaterial to an admiralty proceeding *in rem*. Section 9 relaxes the requirements as to residence in actions at law and suits in equity in the class of cases specified in Section 9, *i. e.*, cases where an award has been made under an arbitration agreement providing that a judgment of the court shall be entered upon the award, whether specifying the court or not as the case may be and whether the adverse party be resident within the jurisdiction or not.

The petitioner asserts in its brief (middle p. 21) that Section 8 in and of itself grants no power to order arbitration but this is to overlook the express words of the section that "the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award." Quite apart, therefore, from anything else in the Act, Section 8 authorizes the court in cases otherwise justiciable in admiralty to direct the parties to proceed with the arbitration and upon the award of arbitrators to enter a decree of court.

An equally misleading statement appears in the first paragraph of page 22 of the petitioner's brief where it is asserted that, under the provisions of Section 9, Sections 10 and 11 apply only to proceedings under Section 9. Such is not the fact but on the contrary there is not a word in Sections 10 and 11 (relating to the vacation, modification or correction of awards) qualifying their scope by reference to Section 9. The only reference in Section 9 to Sections 10 and 11 is not one which confines Sections 10 and 11 to cases within Section 9 but one which applies Sections 10 and 11 to cases within Section 9, *i. e.*, "thereupon the court must grant such an order unless the award is vacated, modified or corrected as prescribed in the next two sections." We have no doubt that Sections 10 and 11 are applicable to cases in admiralty arising under Section 8 as well as to cases at law or in equity and also to awards made in controversies submitted to arbitration without the necessity of litigation to compel such submission. Our contention is that Section 9 is not a qualification of Section 8 which is designed to give free play to the admiralty jurisdiction, unhampered by technicalities foreign to it, so that, except for the substitution of arbitration in the place and stead of trial of the merits before the court and reference to a commissioner to ascertain damages, "the usual course of admiralty proceedings" will follow its ordinary tenor.

POINT IV.

The action is *in rem* within Section 8.

The libel is *in rem* against the tug Gerald A. Fagan as well as *in personam* against Marine Transit Corporation. The Marine Transit Corporation appears in the case both as respondent (being sued *in personam*) and as claimant (having claimed the tug). It is too late to raise on appeal the question, not raised in the District Court, whether such joinder, common enough in practice, is authorized by the rules.

> *Merritt & Chapman Derrick & Wrecking Co.* vs. *Chubb*, 113 Fed. 173, 176 (2nd C. C. A.).

The libel announces "a cause of contract, collision and cargo damage" (R. 3), counts upon a booking contract (R. 5) and sets forth the circumstances of the loss (R. 5, 6). The allegations as to the barge John E. Enright may be disregarded as not affecting the petitioner or enuring to its advantage and as having been abandoned when it turned out that the John E. Enright was not steering. So far as the petitioner is concerned, the libel presents a very usual statement of a contract of carriage and loss of cargo by its breach.

In admiralty it is immaterial whether the libel against a carrier sounds in tort on in contract.

> *California-Atlantic SS. Co.* vs. *Central Door & Lumber Co.*, 206 Fed. 5, 7 (9th C. C. A.); *Rainey* vs. *New York & P. S. S. Co., Ltd.*, 216 Fed. 449, bottom p. 452 (9th C. C. A.).

As said in *Dampskibs Aktieselskabet Thor* vs. *Tropical Fruit Co.*, 281 Fed. 740, 742:

> "It is not necessary to pick and choose between the various schemes of law presented by the pleadings. It is sufficient to apply the doctrine of *The*

Volunteer, 149 Fed. 723, 79 C. C. A. 429, viz.: that it is the practice in admiralty to bring all parties before the court, and to determine the controversy on the merits as it appears from the proof, regardless of technicalities of pleadings—always assuming (as may be done here) that no party is surprised or injured by that equitable proceeding."

The petitioner's real quarrel is with the scheme of the Act itself which in Section 8 designs to combine an arbitration proceeding with a proceeding *in rem*. Such arbitration is necessarily between the libellant and the claimant, if the owner claims, or, if the master should claim, between the libellant and the claimant's principal. The procedure followed below was in strict conformity with Section 8 which authorizes libel and seizure, *i. e.*, a proceeding *in rem*, direction that the parties, *i. e.*, the libellant and the claimant, proceed with the arbitration, and entry of decree upon the award. Such decree would in any case run against the *res* if not released or against claimant and stipulators if a stipulation be substituted for the vessel as in the case at bar.

The petitioner's entire argument on the subject ignores the fact that the Marine Transit Corporation was claimant as well as respondent, that the liability *in rem* arose out of its personal contract and was the same liability whether enforced against the Marine Transit Corporation or against the *res* or against the stipulator. The liability was essentially the same whether enforced against the carrier *in personam* or against the vessel *in rem*; the difference is but one of process and procedure.

The Steamer St. Lawrence, 1 Black (66 U. S.) 522, top p. 529.

So essentially the same is the position of the party liable, whether in form as respondent or as claimant, that even on appeal a libel *in rem*—not rightly brought in that form for want of a lien—has been amended so as to be a libel *in personam* against the claimant.

The Susquehanna, 267 Fed. 811 (2nd C. C. A.).

POINT V.

Objection to the award as not unanimous is not well taken.

The arbitration was to take place before the Grain Committee of the New York Produce Exchange and the committee made its award, signed by four of its five members. There is no provision in the contract or in the Act of Congress requiring unanimity. It is common knowledge that committees act by a majority vote. The objection now urged was not taken in the affidavits in opposition to the motion to confirm the award when, if taken, that objection could have been met by evidence of the rules under which the committee acts. The objection, if it had any substance, was, therefore, waived and is not available on appeal.

As the New York Court of Appeals said in *Matter of S. A. Wenger & Co., Inc.* vs. *Propper Silk Hosiery Mills, Inc.*, 239 N. Y. 199, 202:

> "The contract provides: 'Sales governed by Raw Silk Rules & Regulations of the Silk Association of America'. The record does not set forth the rules. They are, however, a part of the contract. They confer rights upon both parties."

POINT VI.

The shipment was in fact an international shipment and in any event the Act is applicable in this litigation.

It is not denied that the grain in question here was an article of foreign commerce and that its intrastate movement was only a part of and in aid of its transit in the channels of international trade. Obviously the contract was one "evidencing a transaction *involving* commerce" (Section 2 of the Act) in the limited sense of foreign and interstate commerce (Section 1) and the maritime transaction embraced both a charter party (R. 148) and a bill of lading (R. 163-165) even if Section 8 is to be qualified by Sections 1 and 2 in the face of the language "notwithstanding anything herein to the contrary" by which Section 8 declares itself a separate fountainhead of jurisdiction.

The non-negotiable bill of lading issued by the petitioner recites as a fact—and necessarily as a fact of which the petitioner had notice—that the grain, which was shipped to the order of the Bank of Nova Scotia (R. 164), was "From Ft. William, Ont." and "IN BOND FOR EXPORT" (R. 164, last line) and in consequence the petitioner's bill of lading further provides: "Deliver only on surrender of original Lake Bill of Lading properly endorsed" (R. 165). Thus, the lake bill of lading became a necessary document of title under the canal bill of lading and the continuous movement of the shipment in international commerce was recognized. The bond in such case is given by the carrier under Section 551 of the Act of September 21, 1922, 42 Stat. at L. 975, now Section 451 of Title 19 of the United States Code, reading as follows:

> "451. Carriers of bonded merchandise; designation; bond.—Any common carrier of merchandise

owning or operating railroad, steamship, or other transportation lines or routes for the transportation of merchandise in the United States, upon application and the filing of a bond in a form and penalty and with such sureties as may be approved by the Secretary of the Treasury, may be designated as a carrier of bonded merchandise for the final release of which from customs custody a permit has not been issued."

Section 453 of Title 19 of the United States Code further provides:

"453. Merchandise and baggage which may be transported in bond for exportation; regulations.—Any merchandise, other than explosives and merchandise the importation of which is prohibited, shown by the manifest, bill of lading, shipping receipt, or other document to be destined to a foreign country, may be entered for transportation in bond through the United States by a bonded carrier without appraisement or the payment of duties and exported under such regulations as the Secretary of the Treasury shall prescribe, and any baggage or personal effects not containing merchandise the importation of which is prohibited arriving in the United States destined to a foreign country may, upon the request of the owner or carrier having the same in possession for transportation, be entered for transportation in bond through the United States by a bonded carrier without appraisement or the payment of duty, under such regulations as the Secretary of the Treasury may prescribe."

See *B. & O. R. Co.* v. *Settle*, 260 U. S. 166.

Thus, not only was the shipment in international commerce but the carrier gave bond that it should maintain that character which it does not now lie in the carrier's mouth to deny.

The international character of the shipment may exclude the necessity of arguing the coverage of the Act but we submit that Section 8 contemplates as "the basis of jurisdiction" an admiralty cause of action involving libel and seizure, declares such basis of jurisdiction to be independent of the other provisions of the Act, "notwithstanding anything herein to the contrary", and contains neither the word "commerce" nor the words "maritime transactions" previously defined. As the Circuit Court of Appeals noted (R. 243): "Sections 4 and 8, which permit applications to the court, make no reference to these terms." The significance is that litigation involves a basis of jurisdiction not requiring restatement in the Act and in making agreements to arbitrate enforcible the Act contemplated an enforcibility as broad as the jurisdiction of the Federal courts. No such imperfect result as making the agreement enforcible in certain classes of litigation and not in others of which the Federal courts have cognizance could be intended.

Since Section 4 allows a petition in any court of the United States which, save for the arbitration agreement, would have jurisdiction under the Judicial Code at law, in equity or in admiralty of the subject-matter of a suit arising out of the controversy between the parties and since such jurisdiction extends beyond the terms "maritime transactions" as defined by Section 1 with reference to foreign commerce and "commerce" as defined by Section 1 with reference to foreign and interstate commerce, it is apparent that the application of the Act in litigation is as wide as the jurisdiction of the court and is not confined to cases within the terms "mari-

time transactions'' and ''commerce'' as defined in Section 1. The right to petition a court of the United States to enforce an arbitration agreement is defined in terms of the court's jurisdiction, not in the terms employed in Section 1. The solution cannot be that the jurisdiction is to be confined by implication to terms not mentioned in connection with it and repugnant to the terms in which that jurisdiction is expressed. The solution must be that the sections of the Act relating to litigation are independent of Sections 1 and 2 of the Act and that these sections, within their limits, give validity elsewhere to arbitration agreements not litigated in the Federal courts.

The foregoing construction gives consistent meaning to the Act and finds in it a consistent policy. Any other construction leads to impossible results. If the ''maritime transactions'', including collisions, contemtemplated by Section 1, are confined to foreign commerce, is it to be supposed that Congress contemplated that an arbitration agreement affecting a collision in interstate commerce should not be enforced by a petition under Section 4 of the Act or under Section 8 thereof? What reason for such a policy could be imagined? Is it not to impute folly to Congress to suppose that an arbitration agreement affecting transatlantic liners shall be treated as valid but an arbitration agreement affecting coastwise steamers shall be unenforcible? Is it not equally impossible to comprehend the policy that would deny effect in an admiralty court to an arbitration agreement affecting a ship plying between ports of the same state while giving effect to a similar agreement involving a ship plying between ports of different states? Out of what witch's pot can such confusion come? Is it not, however, a mere restatement of the terms of the Act to say that wherever a court of the United States would have jurisdiction under the judicial Code at law, in equity or in admiralty of the sub-

ject-matter of a suit arising out of the controversy between the parties it may direct that arbitration proceed under a written agreement therefor and that where the basis of jurisdiction is a cause of action otherwise justiciable in admiralty, then, "notwithstanding anything herein to the contrary", the court, after libel filed and seizure made, has jurisdiction to direct the parties to proceed with the arbitration and retains jurisdiction to enter its decree upon the award?

"The party claiming to be aggrieved" under Section 8. is, of course, "a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration," as said in Section 4, and nothing in either section confines such "written agreement for arbitration" to agreements involving "maritime transactions" in the limited sense defined in Section 1 with reference to foreign commerce as distinguished from any subject-matter of which a court of admiralty would have jurisdiction under the Judicial Code in the terms of Section 4 or which, apart from the arbitration agreement, would be justiciable in admiralty in the terms of Section 8.

The suggested construction seems conformable to the explanations of the Act given at the time of its passage, for the House report (No. 96, 68th Congress, 1st session), said:

> "The purpose of this bill is to make valid and enforcible agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction of admiralty, or which may be the subject of litigation in Federal courts."

See also The Congressional Record of February 4, 1925, (Vol. 66, part 3, p. 3004, *i. e.*, 68th Congress, 2d session, Jan. 20-Feb. 7, 1925).

POINT VII.

Decree was properly entered against the petitioner and the stipulator for value of its tug.

Had the decree referred to the Marine Transit Corporation as claimant, instead of respondent, there would be no color for petitioner's Point VII but, as the petitioner was both claimant and respondent, the verbiage is immaterial. Suing both *in rem* and *in personam,* the libellants surely had no less right than if they had sued *in rem* alone. The arbitration was ordered under the *in rem* provisions of the Act (Section 8) and the liability asserted by the libel, arbitrated under the order and adjudicated by the decree was one which bound the tug *in rem* as well as the owner *in personam.* The petitioner not only claimed the tug but signed the stipulation for its release jointly with the Continental Casualty Company, stipulator (R. 25B,) and thereby "the claimant herein and the Continental Casualty Company" agreed to "abide by all orders of the court, interlocutory or final, and pay the amount awarded by the final decree rendered by this court and by any appellate court if an appeal intervene". It is to escape from the obligation so plainly assumed that the petitioner now resorts to metaphysical subtlety.

In the case at bar, the libel was maintainable *in rem* and the stipulation was given as a substitute for the vessel so that the stipulator was liable to the exercise of every authority on the part of the court which it could properly exercise if the thing itself was still in the custody of the court.

The Wanata, 95 U. S. 600, at p. 611;
The Palmyra, 12 Wheat. (25 U. S.) 1.

As Judge Ware said in *Lane* vs. *Townsend*, 1 Ware 286, 293, Fed. Cas. No. 8054:

> "If, therefore, there is an ambiguity in the terms of the stipulation, or the construction of them is doubtful, it is not the intention of the party for which we are to inquire, for the will of the party had nothing to do in determining its conditions; the doubt must be removed by consulting the intention of the court, or the law which required the stipulation and dictated its terms."

See *The Beaconsfield*, 158 U. S. 303.

As the Circuit Court of Appeals for the Fourth Circuit said in *The Glide*, 72 Fed. 200, 202, 203:

> "In other words, the sureties, in great measure, stand in the position of bail to the action. They are not parties to the cause. They are represented by the claimant; they covenant to pay such decree as may be made against him; and the decree against him binds them."

As the Circuit Court of Appeals for the Sixth Circuit said in *The New York*, 104 Fed. 561, 564:

> "Such a bond is not a mere personal security given to the plaintiff, but a security given to the court. It is 'a pledge or substitute for the property proceeded against', and the sureties are not parties to the suit, or entitled to interfere in any way with the management of the suit * * *. Unless some extraneous question arises, involving the scope or obligation of the sureties in such a bond, they are not necessary parties to an appeal taken by any of the parties to the record."

In the case at bar the stipulator has not sought relief special to itself by any appropriate proceeding.

As the Circuit Court of Appeals for the Ninth Circuit said in *Perriam* vs. *Pacific Coast Co.*, 133 Fed. 140, middle p. 144, after citing *The Wanata*, 95 U. S. 600 and *The Belgenland*, 108 U. S. 153:

> "There is implied in these utterances of the court a denial of the right of the sureties to be heard on the appeal as to any matter affecting the merits of the main controversy. No controversy has arisen in this case concerning the liability of the surety company upon its stipulation."

Henry on the Jurisdiction and Procedure of the Admiralty Courts of the United States says (pp. 343, 344):

> "The stipulator is a surety for the claimant, who by entering into the bond becomes individually liable in that cause of action in which he makes claim. Such personal liability does not necessarily arise from the actual ownership by the claimant of the vessel which incurs a maritime lien, as where the whole vessel is chartered to another who sails and provides the funds, or to the master who sails the vessel on shares. The claimant may be master, owner or a foreign consul and the stipulators are the sureties of the claimant who becomes a principal by entering into the stipulation. * * *
>
> The act of 1847 (Rev. Stat. §941), permitting a bond with sureties to be taken by the marshal, provides that the court may enter a decree, and award execution at the same time against the principal and his sureties on the bond given for the release. The same power exists as to stipulation taken by the court on the release of the vessel to the claimant."

Admiralty Rule 8 of the Rules of the District Court for the Southern District of New York prescribes the form of the stipulation—a form which does away with the former requirement of motion for summary judgment against stipulators—and provides in part:

> "Such stipulation shall contain the consent of the stipulators, that if the libellant or petitioner recover, the decree may be entered against them for an amount not exceeding the amount named in such stipulation and that thereupon execution may issue against their goods, chattels, lands, and tenements or other real estate."

The stipulation in the case at bar is in that form (fols. 75, 76). The form of decree cited by opposing counsel in Benedict on Admiralty was entitled in the Eastern District of New York and, as indicated by the footnote thereto, was not entered upon the Southern District form of stipulation.

As far back as 1834 in *The Virgin*, 8 Pet. (33 U. S.) 537, at p. 555, we find a form of decree against claimant and stipulators as follows:

> "And this court, further proceeding to render such decree as the circuit court ought to have rendered in the premises, it is further ordered, adjudged and decreed, that the said claimant, Graf, do forthwith pay into the said circuit court the sum of $1800, being the amount of the appraised value of the said ship Virgin, delivered to him on stipulation, as in the proceedings mentioned, together with interest thereon, at the rate of six percent., from the 24th day of March, 1824, when the same was delivered to him on stipulation as aforesaid, unto the day when the same sum shall be so paid into the circuit court, together with the

costs of the district and circuit courts; and unless he shall do so, within ten days after the said circuit court shall require the same to be done, that execution do issue, in due form of law, upon the stipulation aforesaid, against all the parties thereto. And upon the payment of such sums, then that the claimants, as owners of the said ship Virgin, be and hereby are forever exonerated from all other and further payment in the premises. And it is further ordered, adjudged and decreed, that this cause be remanded to the said circuit court, with directions to carry this decree forthwith into effect."

Very appropriate to the case at bar is the language of Judge Benedict in *Harriman* vs. *The Rockaway Beach Pier Co.*, 8 Fed. 94, bottom p. 95:

"This stipulation was without qualification. It was given voluntarily, and not in obedience to any order of the court. It was not necessary to the defense of the cause, nor in any way compelled. By virtue of this stipulation the defendant acquired possession of property then in the possession of the marshal. Under such circumstances, I do not see how it can be open to stipulators upon that stipulation to say that the court has not acquired jurisdiction to enter a decree upon the stipulation."

Section 8 of the Act, unless it contemplated a nugatory thing, must have intended that a proceeding which begins with the seizure of the property and in which the court retains jurisdiction to enter a decree should end with a decree against the property or against those liable upon the stipulation substituted for the property. Such has been the course of proceedings in the case at bar and the proceeding was ripe for decree, for everything contemplated by Section 8 as precedent to decree had been accomplished.

POINT VIII.

The petition and supporting brief do not conform to the requirements of the rules of this Court prescribing that such petition shall contain only a summary and short statement of the matter involved and the reasons relied on for the allowance of the writ and that the supporting brief must be direct and concise.

Respectfully submitted,

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